UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America, Plaintiff,	)	File No. 16-CR-334 (JNE/KMM)
vs.	)	Minneapolis, Minnesota
Paul R. Hansmeier,	)	June 23, 2017
Defendant.	)	9:00 a.m.

BEFORE THE HONORABLE
KATHERINE M. MENENDEZ
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
(MOTION HEARING)

APPEARANCES

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Proceedings recorded by mechanical stenography; transcript produced by computer.

P R O C E E D I N G S

IN OPEN COURT

THE COURT: All right. Good morning, everybody. We are here to talk about pre-trial motions in United States versus Paul Hansmeier. And why don't -- we are obviously making a record. Why don't we start by having counsel note their appearances, first, counsel for the government.

MR. LANGNER: Good morning, Your Honor. Ben Langner and David MacLaughlin on behalf of the United States.

THE COURT: Excellent.

MR. MACLAUGHLIN: Good morning.

THE COURT: Welcome to both of you. And next, counsel for Mr. Hansmeier.

MR. MOHRING: Andrew Mohring and Manny Atwal representing Mr. Hansmeier who is here with us in court as well.

THE COURT: Thank you. Thanks to both of you. And welcome, Mr. Hansmeier. How are you doing?

THE DEFENDANT: Very well. Thank you, Judge.

THE COURT: Okay. So let's start with the easy stuff, let's talk through the motions that the defense has filed and the government has filed that don't require as much debate and thinking. And Mr. Mohring, are you going to be speaking first on behalf of Mr. Hansmeier?

MR. MOHRING: Yes, Your Honor, I am.

THE COURT: Okay. So let me ask a question I guess to both counsel that might help me have backdrop for the couple of discovery issues that there's a little bit of debate about. Most of these are completely noncontroversial. I think both sides understand *Brady* and its ongoing requirements, and I don't expect any problems there.

Are you, Mr. Langner, taking an open file approach to discovery or something different in this case?

MR. LANGNER: Your Honor, we've essentially turned over or made available everything we have with the exception of Jencks materials which we anticipate discussing with defense and turning over well in advance of trial.

THE COURT: Great. Okay. So when we're talking about the timing of the -- I guess I sort of did a head fake calling Mr. Mohring to the podium and then talking to you. Sorry about that.

MR. LANGNER: That's okay.

THE COURT: But when we're talking about the timing of both expert disclosure and 404(b), is it fair to say with respect to 404(b) that you've already turned over the underlying evidence but that what you are debating about is when you need to make the formal 404(b) notice?

MR. LANGNER: Exactly, Your Honor. There's

only -- I'm only aware of two categories of events or activities that would be considered 404(b), one being the defendant's bankruptcy proceedings which obviously he's aware of and we've turned over materials to the extent that we have them, the other being his activities with the ADA lawsuits that he's filing. I'm not sure that we will seek to introduce either of those in relation to the wire fraud and mail fraud scheme but certainly the defense is well aware of those. We've turned over whatever materials we have. We have not, obviously, thought through specifically how we would introduce those if we were to introduce those at trial, though.

THE COURT: Okay. Thank you. Mr. Mohring, what are your concerns with 14 days with respect to the 404(b)?

MR. MOHRING: Well, Your Honor, the -- the notice serves a legitimate purpose in the process. I mean, there has been a very extensive collection of discovery materials disclosed already and the promises of even more to come. As -- as reflected in discovery declaration that I filed along with the pre-trial motions, there are no obvious Rule 16 type omissions from the discovery, at least as we can tell, although it's difficult to be -- to know what's in the black box that is the government's collection of records. But the fact that we have a bunch of stuff that the government may or may not seek to introduce through Rule

404(b), that's a step in the right direction, but without the notice, we don't know what we're shooting at. We don't know what we're shooting at from a standpoint of relevance and relevance objections. We don't know what we're shooting at from a standpoint of admissibility under 404 itself.

We certainly aren't in a position, without the notice, to litigate the balance of prejudice versus probative value of the material. And so getting a notice 14 days before trial, in a situation where at least the existing order has an -- a day -- a deadline I think ten days before trial for any and all pre-trial motions, motions in limine, jury instructions, voir dire -- proposed voir dire questions, gives us effectively three days to flesh out and litigate all of those questions for 404. And these are -- this same set of considerations apply as to the expert notice as well but so --

THE COURT: Okay. I want to talk about expert in just a moment.

MR. MOHRING: Fair enough.

THE COURT: Mr. Langner, is it your --

MR. MOHRING: One last point if I may, Your Honor.

THE COURT: Oh, certainly.

MR. MOHRING: I apologize for interrupting, but the allegations in the indictment focus on a time period between 2011 and 2014 so kind of in the mix of

considerations about the fairness of a burden -- of a -- or the burden of a deadline much further in advance of trial than just 14 days is that the government has had this case and had this investigation for a long time and so this is not a situation where we are responding quickly to events that very recently happened with a person in custody and the pressures of the Speedy Trial Act bearing down so.

THE COURT: Okay. Thank you. Mr. Langner, what can you tell me about the likelihood, and I don't expect you to, you know, commit or pinkie swear, but the likelihood of expert testimony in this matter?

MR. LANGNER: I'm not -- I have no present intention of using an expert in this case.

THE COURT: Okay.

MR. LANGNER: So if that happens, it would be based on something that develops between now and trial.

THE COURT: Okay.

MR. LANGNER: I could see us perhaps calling somebody to testify about bank records but that would really not be expert testimony.

THE COURT: That would be foundational.

MR. LANGNER: Right. So I don't think we will be calling an expert, Your Honor.

THE COURT: Okay. And Mr. Mohring, what are your thoughts about the likelihood of expert testimony in this

matter?

MR. MOHRING: You know, the real concern that we have is are they going to call an expert such that we would need or it would be prudent for us to have expert testimony to try to rebut it, so as things stand, I'm not aware of anything to --

THE COURT: Okay. So I'm sensing sort of a mutual if he goes first, I will kind of approach to expert likelihood.

MR. MOHRING: I don't know about mutual but --

THE COURT: Okay. Good. So I'm --

MR. MOHRING: But and in light of -- in light of which a request of notice, setting a deadline for notice 60 days before trial, which is our request, ought not be a problem based on what I'm hearing.

THE COURT: And you've indicated 14 days for experts as well?

MR. LANGNER: That's what I've indicated. We could certainly do, you know, 30 days. I think that would be reasonable.

THE COURT: Okay.

MR. LANGNER: To the extent that we are going to have something, but I mean, 60 days is just I think far, far in advance of trial for an unlikely event at this point.

THE COURT: Okay. Anything else that you would

like me to hear with respect to all motions, aside from the motion to dismiss or the motion for a Bill of Particulars?

MR. LANGNER: Not from the government, Your Honor.

THE COURT: Okay.

MR. MOHRING: Your Honor, just so on Rule 16, I've already indicated there are no obvious omissions. The process I think calls on us to file a Rule 16 motion in some cases.

THE COURT: Sure.

MR. MOHRING: And so we did here. I regret the late submission and I apologize for the late submission of a *Brady* motion. We did offer that. There's a -- an *Agers* list that is fairly conventional, but there are a couple of points right at the end. We are seeking as *Brady* information, but also in context with the Bill of Particulars, about which perhaps more in a minute, information about the individuals that the government refers to as victims or that they conceive of as victims in this case, seeking information about whether the people that they believe are victims downloaded materials that are potentially subject to copyright protection, seeking information about the nature and the extent of the victims' downloading activities, and information and any authority that those -- the government's claims or that the claims in the civil lawsuits are vitiated by the defendant allegedly

uploading the materials that the victims, if indeed these are the victims, downloaded.

THE COURT: You think that the -- that *Brady* requires the government to articulate a theory to you?

MR. MOHRING: I think that *Brady* requires the government to offer information. And it's not just *Brady*. I mean, we have a -- we have a context in this case in which the indictment is a sweeping and sprawling document. It speaks in vivid but sometimes imprecise language. There are -- there are intimations of a number of different potential types of victims, and so in that -- so the *Brady* request and the motion for a Bill of Particulars also exist in that context. So some of the -- some of the -- I recognize some of the more expansive nature of the *Brady* request and of the information that we're seeking in the Bill of Particulars. This is more expansive than what we usually ask for as *Brady*. And Bills of Particulars happen but not everyday.

THE COURT: I have not seen one.

MR. MOHRING: But I would say -- but, you know, we're -- that -- the need for that type of information and the appropriateness of those requests, both as *Brady* and in the context of setting the Bill of Particulars, is driven by the indictment itself, and that -- the government chose to write what they wrote.

THE COURT: Okay. Thank you. I think you can be seated, unless there's anything else on the non-dispositive motions, Mr. Mohring.

MR. MOHRING: Just to say this, Your Honor, the government did file I believe a motion for reciprocal discovery, and we don't object to that.

THE COURT: Okay. Great. Thank you.

Mr. Langner, I'm going to save the conversation for the Bill of Particulars until after our conversation about the motion to dismiss. Is there anything you'd like to say about the *Brady* motion?

MR. LANGNER: I guess I'll -- there was a little bit of joint discussion there --

THE COURT: Yeah.

MR. LANGNER: -- about Bill of Particulars and *Brady*. To the extent that we have information about victims or whether they uploaded materials, we, of course, would disclose that.

THE COURT: Okay.

MR. LANGNER: I think what, in large part, the electronic evidence of that is not in our possession, if it even exists. To the extent that we've inquired about that or we have information from the victims about that, it would be in the Jencks materials which we, of course, will turn over.

THE COURT: Okay. Why don't I go ahead and rule on the non-dispositive motions, and I'll save the conversation about the Bill of Particulars for after our conversation about the motion to dismiss. Both discovery motions, Docket Nos. 33, which is the government's motion for reciprocal discovery, and Docket No. 51, which is the defendant's motion for discovery and inspection, will be granted to the extent provided by the rules. And this will be codified in a brief order after the hearing. I'm not sure if "codified" is the right word. This will be captured in a brief order after the hearing.

The -- I'm going to agree in part with the defense as to motions at Docket 52 and 53. 30 days seems like an appropriate balance for both expert testimony and 404(b) in this case. Mr. Langner, I appreciate that you have already provided substantial information related to possible 404(b) issues. My concern is both of the areas that you mentioned are so sweeping in scope or potentially sweeping in scope, completely separate but could be large scale allegations, that it will require some time for the defense to prepare a motion on whether that's an appropriate use of 404(b) or not so 30 days does that. I think 14 is cutting it too close.

I'm going to decline the invitation for 60 days of expert testimony. I think 30 days achieves that goal as well. But I certainly encourage both sides, and I think it

sounds like it will start with you all, but if you change your mind at some point and are thinking about hiring an expert, letting the defense know that as early as possible, aside from this ruling, will allow them to consider hiring their own expert as well even before the formal requirement of the full expert report is due.

I am going to grant the *Brady* motion to the extent required by *Brady* and *Giglio* and their progeny. I am not going to opine about whether Mr. Mohring's request for specific types of information is governed by *Brady* or not. I do note that *Brady* places requirements on the government to look beyond just its own files for information but mostly into the files of law enforcement and not necessarily to go looking for third-party discovery that might be exculpatory for the defendant. So I will grant that motion to the extent required by *Brady*, *Giglio* and their progeny. And are -- if disputes emerge about whether that's being complied with, I'm happy to consider those down the road or I'm sure Judge Ericksen would do so as well.

Let us turn to the motion to dismiss. And Mr. Mohring or Ms. Atwal, whoever is going to address this, you get to go first.

MR. MOHRING: Thank you, Your Honor. Well, Your Honor, for the reasons that have been articulated at considerable length, I recognize, in our pleading.

THE COURT: You said it.

MR. MOHRING: The indictment in this case fails to say a criminal cause of action and the charges should be prevented from going to trial. They should indeed be dismissed.

THE COURT: Can I clarify which type of motion to dismiss we have? And I think it's clear, but I just want to make sure.

MR. MOHRING: Well, we're relying on Rule 12.

THE COURT: Yeah.

MR. MOHRING: And I believe Rule 12, both (b)(3) and (b)(6).

THE COURT: So is it your argument that as that -- that the indictment sets forth the elements of the offense, sets forth sufficient facts but that those facts cannot constitute a crime as a matter of law?

MR. MOHRING: That's one argument.

THE COURT: Okay.

MR. MOHRING: Well, actually, no, I -- I would parse that slightly differently. We think that the indictment itself is legally deficient because the facts outlined in the indictment do not constitute the crime of fraud that they are -- and do not meet the requirements of the statute itself. But we also believe that the facts as alleged do not meet the elements of fraud, do not

substantiate those. So I mean, the -- they do -- they do pay lip service to the elements of fraud. They do say that there was a scheme. They do say, I believe, that there's a claim of materiality. But the actual facts do not substantiate them.

So if I may, I -- we have identified a number of independent bases, a number of independent defects in the indictment, any one of which, each of which, is sufficient to support dismissal of the charges that we're focussing on. And I want to be clear about a couple of things. We're focussing on Counts 1 through 17, so we're talking about the fraud charges, we're talking about the related money laundering charges, and we're talking about the conspiracies that relate to each of those set of allegations. That's -- that's -- those are the charges that the motion focuses on.

And I guess also to be clear at the outset that we understand and don't dispute that at this -- that the evaluation and the lens through which the Court is directed to look in considering these questions is assuming that everything in the indictment is absolutely true and construing and characterizing what is in the indictment in the manner most favorable to the government. Obviously in talking about these things, we don't concede the truth of any of that.

THE COURT: Right.

MR. MOHRING: But that is the proper standard --

THE COURT: But your belief --

MR. MOHRING: -- and perspective here.

THE COURT: -- that they might fail to prove X or Y allegation isn't the basis of your motion.

MR. MOHRING: Correct. Right. So the government -- at the heart of the government's claim is a claim that Paul Hansmeier and other defendants, named and not named, engaged in baseless infringement lawsuits, civil lawsuits, and that in so doing they committed the federal crime of fraud.

THE COURT: Let's hit pause there.

MR. MOHRING: Mm-hmm.

THE COURT: The word "scheme" is sort of central in the fraud statute, and it can be charged two different ways, I think here they're trying to charge both ways, I'm going to ask Mr. Langner about that, but it is more than simply -- the allegations in the indictment are far more than simply engaged in certain meritless civil litigation. It is several other parts that include suborning perjury, committing perjury, generating false evidence, creating sham entities to conceal true ownership, and hiding critical facts like the fact of uploading to BitTorrent, as well as a set of claims of a completely -- allegedly completely

fabricated nature, the hacking, what I'm going to refer to, you know, for convenience sakes is the hacking claims, inventing an allegation that you're trying to seek -- that Mr. Hansmeier was trying to seek early discovery to ferret out unlawful hacking of his clients' computer systems when that was untrue. So this is beyond, and I'm going to push back a little bit, beyond the idea that it is merely filing a specious set of litigation, right?

MR. MOHRING: And yet without that litigation, I don't think we would be here and I don't think that the indictment would stand, so the -- what they call in various ways specious or baseless or sham or frivolous or fraudulent, the indictment uses a number of terms that I searched for definitions in Title 18 in vain, that -- that -- the civil litigation that they characterize in those various ways is central to the scheme that they allege, is central to the charges so.

THE COURT: And are you saying that because of that it is immune from prosecution? Is it your position that a scheme that has a heart in civil litigation cannot be the subject of a mail fraud or wire fraud or conspiracy prosecution?

MR. MOHRING: Absent something more which is not present in this set of allegations, yes.

THE COURT: And the something -- okay. So I want

to talk about that in a minute. But in your opinion, the -- the perjury is not something more, it is part of the civil scheme, civil litigation scheme?

MR. MOHRING: Right.

THE COURT: And in your opinion, the --

MR. MOHRING: Understanding that --

THE COURT: -- shell --

MR. MOHRING: -- we're talking about the perjury charges in the indictment. We're not --

THE COURT: I'm talking about the perjury charges --

MR. MOHRING: Yes.

THE COURT: -- alleged in the conspiracy count --

MR. MOHRING: Yeah.

THE COURT: -- not the Count 18.

MR. MOHRING: Yes.

THE COURT: That is not separate, that's not extrinsic to the civil litigation scheme in a way that makes your statement untrue.

MR. MOHRING: Correct.

THE COURT: Okay. So I want to flesh that out. Let's imagine that there is a civil litigation that is fraudulent in its entirety, so let's pretend that a lawyer chooses an area of the law to pick on unsophisticated victims who are unlikely to have counsel and invent a

contract, going door to door and saying I actually purchased ten years ago the mineral rights under your home and I am going to bring in a drilling company to drill under your home and the only way you can get around it is by paying me money and here's a copy of the complaint that I'm going to file and I have a lawyer or am a lawyer and all of that is untrue and that could never be the subject of a mail fraud or a -- and then let's say there's mailing or wiring that gets us the hook, that could never be the subject of a criminal prosecution in your mind?

MR. MOHRING: You know, I struggle with an answer to the question because the hypothetical is so far from the circumstances of this case. It is not at all clear that the litigation in this case was itself fraudulent.

THE COURT: I'm trying to test --

MR. MOHRING: And so --

THE COURT: -- your dominant theory.

MR. MOHRING: Right.

THE COURT: Which is not whether this litigation was fraudulent, because they say it was and we're struck with that, right, for today. You might not be stuck with that at trial, but you are stuck with them claiming that he had no intention of pursuing the litigation, and I am interested in the copyright issue, but for understanding the scope of your position, are you saying that no matter how

extreme something that lives entirely in civil litigation cannot be the subject of a criminal prosecution?

MR. MOHRING: You know, I'm not sure that I'm prepared to go quite that far, but certainly, certainly, it would have to be very extreme and much more extreme than anything that the indictment spells out, alleges here. I would quibble with at least with one thing I heard you say. I mean, we are stuck with the facts alleged in the indictment. We are not stuck with the characterization --

THE COURT: No, that's true.

MR. MOHRING: -- of those facts, the legal characterization of those facts that the indictment purports to make and so the indictment says fraud, that doesn't mean that they've pled fraud, that doesn't mean that the facts support fraud.

THE COURT: So I guess the first --

MR. MOHRING: And that doesn't mean that the case law that very seriously -- imposes very serious limits, the Eighth Circuit case law included in this case.

THE COURT: Let's talk about the case law for the proposition that it could have to be unusually extreme to constitute a criminal fraud violation. Your best support for that is *I.S. Joseph*?

MR. MOHRING: Yes.

THE COURT: *I.S. Joseph*. So --

MR. MOHRING: And as discussed and applied in other cases but *I.S. Joseph* is an Eighth Circuit case. *Pendergraft* which discusses and extends the application of the *Joseph* holding I think is an Eleventh Circuit decision.

THE COURT: But *Pendergraft* is really cabined by *Lee*, wouldn't you agree? I mean, which said all of the musings about civil litigation being immune from prosecution were basically dicta and the critical part of *Pendergraft* was that nobody believed the affidavits. I think --

MR. MOHRING: Yeah.

THE COURT: -- *Pendergraft* has some vulnerabilities. I'm -- I'm more mindful that *I.S. Joseph* is an Eighth Circuit case.

MR. MOHRING: Right.

THE COURT: How central to the rationale of *I.S. Joseph* do you think the facts of it being an extortion case and, frankly, a RICO case where the court says the real issue is that two threats to commit civil litigation cannot constitute a, oh, I'm trying to find the term they used, it's a RICO term, an enterprise.

MR. MOHRING: I think that the -- I think that the -- the *Joseph* holding extends beyond RICO, I mean, but even if -- even if you view that otherwise, and I mean, so the *Joseph* -- to play that out, the *Joseph* court says that threatening litigation, even threatening baseless

litigation, is not criminal, not criminal within the context of a RICO -- a criminal RICO prosecution but not -- or rather a civil RICO prosecution but not criminal. Even though if you -- if you limit, as the government suggests that you should, the import of that case to a setting of extortion, suggestions of extortion, albeit imprecisely, again, the indictment is a sweeping and colorful document, but suggestions of extortion as a central component of the fraud scheme, of the scheme that the indictment alleges, appear throughout the indictment. So even if it's just --

THE COURT: But the difference is they don't have to prove extortion in this case and they did have to prove extortion the way the RICO case was pled, right?

MR. MOHRING: I think that's true.

THE COURT: They might be using it as icing or hyperbole or, you know, inflammatory language, we can talk about why the word extortion is in the indictment, but they don't have to prove extortion to prevail in this case, whereas in *I.S. Joseph* they do.

MR. MOHRING: I think that's -- that's correct. That's right.

THE COURT: How has *I.S. Joseph* been interpreted subsequently by the Eighth Circuit or does have it any continuing life in the cases? I couldn't find much of one.

MR. MOHRING: I couldn't either. And I realize it

was a I think a 1984 case, but we rely on cases that old and older all the time.

THE COURT: Yeah.

MR. MOHRING: And it certainly it hasn't been refuted by the Eighth Circuit. And I think the absence of case law on this point in the Eighth Circuit and the relative absence of it anywhere is an indication of how far out -- how far beyond the norm the charges in this indictment are --

THE COURT: Let me ask this.

MR. MOHRING: -- how far -- how extreme the government's -- and even radical the government's invitation to you and to this Court to criminalize civil litigation in a manner that they have asked you to do.

THE COURT: Let's imagine that this case was entirely about the requests for early discovery and the government somewhat alleges that there was no intention to pursue full-on litigation, they say that in the indictment that there was -- in fact I think they use the term there was no intent to actually bring the lawsuit, it was all about discovery, civil discovery, early civil discovery.

MR. MOHRING: The facts don't -- do not support that, but I understand.

THE COURT: And well, that's a problem for another day.

MR. MOHRING: Right.

THE COURT: Or an opportunity for another day if you're the defense, I guess. But is it -- does it matter that a district judge or a magistrate judge being asked to use the somewhat unusual tool of early discovery, it's an exception rather than the rule, I -- it is not often used and it -- there has to be particular showings to make it happen, would not have granted early discovery had they known about the uploading?

MR. MOHRING: Is the Court's question does that matter?

THE COURT: Yeah. Doesn't that create a sort of significant unique exception, something that makes this case different from merely threatening to sue someone?

MR. MOHRING: I -- that's hard for me to say.

THE COURT: I mean, lying to a judge to get them to issue -- if that's -- if that is what is here, or, let's -- making a material omission when you have a duty to disclose, which I want to talk about in a minute, making a material omission when you have a duty to disclose a fact that, if it were disclosed, would not have led to the issuance of early discovery, could that constitute a fraud?

MR. MOHRING: Under a materiality standard?

THE COURT: Mm-hmm.

MR. MOHRING: So if it might have had the possible

impact on the judge's decision?

THE COURT: And I think the government alleges that it would have had that impact.

MR. MOHRING: That's a hypothetical but --

THE COURT: Okay. Let's say that's all that was alleged here is seeking early discovery, knowing that a judge would not issue the early discovery if they had known a material fact, having a duty to disclose that material fact and not doing so, could that constitute a wire or a mail fraud, depending on how you filed your motion?

MR. MOHRING: I suppose in theory it could, but that's not what we have here.

THE COURT: Okay. How is that not what we have -- how is that not one part of what we have here?

MR. MOHRING: Okay. So under cases that we've offered to the court, accepting for purposes of present argument --

THE COURT: Absolutely.

MR. MOHRING: -- the government's allegations as true, so the facts that we're talking about are the government's allegation that Paul Hansmeier and others, known and unknown, engineered the uploading of material as to which they made a claim of copyright protection --

THE COURT: Right.

MR. MOHRING: -- to a site from which it was

downloaded and so what we're talking about then for this specific set of questions is the -- the alleged omission of that information from the civil litigation that they've filed, including and preceding the request for early discovery. There is abundant support, and we've highlighted it to the Court in writing, for the proposition that there is no obligation on the part of a civil plaintiff to allege or offer information that would support an affirmative defense on the part of the defendants.

THE COURT: And that's not what -- that's why I'm specifically not asking that. I'm not talking about the failure in a subsequent complaint to flag a possible defense. I'm talking narrowly about utilizing the Court's early discovery and not revealing a fact that, assume for a moment, and this is a fact at trial, would be material to a magistrate judge. For instance, as a magistrate judge, I would find it important, but I recognize that my subjective thoughts are not what's relevant here, to know that uploading had happened when I was confronted with a request to use the somewhat exceptional power of early discovery. So your points about not flagging a defense I'm utterly persuaded by and I'm going to spend some time talking to the government about that. I don't mean as to a final conclusion, I mean they present really good questions. This is a different question that I'm asking, but this is a part

of the scheme.

MR. MOHRING: I would, so, again, not -- I'm not sure that that -- this is where we are, but I would -- to answer your question as directly as I'm able, I would suggest that to base a criminal fraud prosecution on the omission of a material -- a material piece of information in an application for unusual discovery authority ought not form the bases of a criminal prosecution.

THE COURT: Cannot? Because ought isn't so much vested in the authority of the magistrate judge but can is our question today.

MR. MOHRING: I can say I cannot imagine a set of facts in which the omission of a material -- of material information in a discovery application in a civil lawsuit would support a -- a criminal prosecution. Sanctions, dismissal, other -- other, you know, referral to bar disciplinary authorities, all of which have happened, as the government has demonstrated at considerable length, in this set of circumstances, sure, but a criminal prosecution and the -- the criminalization of that type of conduct? I -- I can't imagine something that would be so extreme, fitting within the constructs of the Court's hypothetical, that that would support a criminal prosecution. And I would think that even the attempt to do something like that would and should be met with serious reservation and hesitation and

restraint.

THE COURT: Okay. I know I'm jumping around a lot.

MR. MOHRING: That's okay.

THE COURT: I've just got a couple of other questions --

MR. MOHRING: You get to.

THE COURT: -- from your memorandum. Is it your position that an omission, aside from the civil litigation context of the omission, that an omission, combined with a duty to disclose, can't constitute fraud or are you not saying that? I don't want to push back on arguments you're not making.

MR. MOHRING: So now we're shifting to the --

THE COURT: Theoretical idea of fraud as opposed to in this particular context, can it be an omission combined with a duty to disclose?

MR. MOHRING: But now we're bringing in the rules of professional responsibility and the duty of candor to the Court, that sort of --

THE COURT: Well, we can talk more generally about whether there's a duty to disclose in this case and where that comes from, but I'm just -- I'm more in black letter law of fraudness, normally it's a false statement, a material false statement or misrepresentation, or a set of

material false statements and misrepresentations, but there's also I think some case law that supports the idea that it could just -- maybe not just as easily but could also be an omission that's material if there were a duty created somewhere, whether it's on a form or from a fiduciary duty, it -- that can constitute a fraud. Is that true?

MR. MOHRING: In the presence of harm to property and --

THE COURT: And the other elements.

MR. MOHRING: -- the other requirements and all of that, I think that -- I'm not aware of authority that would say otherwise.

THE COURT: So are you arguing that there isn't a duty here that could be elevated to create that reality? I mean, part of your brief focussed on the idea that there's a flaw in importing the duty from such sources as the rules of professional responsibility or district court rules or wherever from whence it comes, is it your position that those can't give rise legally to the duty?

MR. MOHRING: It's certainly our position that the proper forum for those concerns is not a criminal prosecution but rather the normal course of civil litigation and the operations of the attorney disciplinary authority that is given the authority to enforce the rules that the

government is relying on. I realize that's not quite --

THE COURT: No, that's --

MR. MOHRING: -- a direct answer to the Court's question but fair question, a legitimate concern, but the wrong forum and the wrong document bringing those concerns and the fact that there has been active and vigorous and pointed activity on the part of attorney disciplinary authorities against this man shows that that's --

THE COURT: So another hint that I got from your memorandum but that was less emphasized in your reply, and I don't want to, you know, say ah-ha, you've waived it, because you were very explicit in your reply that you weren't purporting to restate all of the facts, but it could also be that, in light of the government's clarifications that came in their response, you didn't pursue this, so I want to know which it is to decide how much ink I spend working on it. Is it your position that as a matter of law, a lie to one party leading to retrieving property that qualifies from another party cannot constitute a violation of these statutes?

MR. MOHRING: So I appreciate your zeroing in on that. I saw the government's -- I mean, that's -- that's an open question as to which there's a significant amount of dispute among the circuits. The government has cited an Eighth Circuit case saying that you don't need that kind of

unitary, that --

THE COURT: Convergence is the word I saw in one of the cases.

MR. MOHRING: Right. In the apparently in the Eighth Circuit that is not a requirement.

THE COURT: And so you no longer are relying on that as a basis to undermine the validity of this indictment?

MR. MOHRING: We would certainly want to retain an objection to that in the event that this case goes up because it does appear that there is a significant split among the circuits on exactly that point but --

THE COURT: Okay. So you agree maybe that my hands might be tied on that question.

MR. MOHRING: On that specific question, it does appear so.

THE COURT: Now but that you persist in an argument that that is an incorrect application of the fraud word.

MR. MOHRING: Yes.

THE COURT: Okay. And your best authority, aside from policy arguments, which while I might find persuasive aren't usually mine to make, your best authority for the idea that the civil litigation arena, no matter -- sort of no matter how egregious that misconduct in the arena of

litigation is not properly the subject of a fraud prosecution and the heavy criminal sanctions that go with it, your best authority for those are *I.S. Joseph* and *Pendergraft*?

MR. MOHRING: Well, also *Wolfchild*, Your Honor, which is a 19 -- or 2016 decision from the Eighth Circuit.

THE COURT: Can you point to me, to the page that that is in your brief just so I can find my notes.

MR. MOHRING: I think we were focussed on page 770 to 771 in *Wolfchild*. Oh, you're talking about the page in the brief.

THE COURT: Yeah, I'm sorry, I sort of mistakenly --

MR. MOHRING: The pincite in *Wolfchild*, I was impressed to be able to offer that to the Court.

THE COURT: Yeah, that was pretty remarkable.

MR. MOHRING: We'll get that to you in a minute.

THE COURT: Okay. Megan beat you to it. It's page 10. Thank you. Give me just one moment to pull this out, please.

Okay. Go ahead, Mr. Mohring. Thank you. Sorry for the delay.

MR. MOHRING: So when you look at *I.S. Joseph* and you look at *Pendergraft* and you look at *Wolfchild*, I think, taken together, the decisions show that a threat to file

litigation, a threat to file even baseless litigation, is not actionable as extortion, is not criminal. Says *Joseph*, even a claim based on false and fabricated evidence is not criminal, also a RICO case, as *Pendergraft*. All that is needed, in fact, is a colorable claim, says *Wolfchild*. And that if there are issues about that claim, that the proper remedy is dismissal and that concluding otherwise is in fact an abuse of discretion said the Eighth Circuit in *Wolfchild*.

And all of that adds together to say that the indictment is deficient in that it is based on a claim of baseless civil litigation, A, being criminal, B. And we've demonstrated that whether the question of whether this litigation was baseless or a sham or the other synonyms that the government used, that is very much an open question. But even if it was, this body of precedent shows that that cannot form the basis of a criminal fraud prosecution.

The government itself even concedes, albeit indirectly, implicitly in their reply that the litigation that is at the heart, at the foundation of this indictment is, in fact, not frivolous. They talk about conduct that they allege is attributable to Mr. Hansmeier as generating an implied license, but the case law is far from unanimous on that point alone, and the civil litigation is not, you know, pick a word, is not specious, is not baseless, is not sham, is not frivolous, is not fraudulent.

THE COURT: What I'm struggling with, Mr. Mohring, is that maybe if we view just the question of whether filing this litigation could give rise to a fraud prosecution in a vacuum or in isolation, it might be a harder question. But the government points out, and the case law is clear, scheme means scheme. It means something more than parsing with a scalpel things into individual discrete allegations and viewing them each alone. We have to view them all together when the statute says scheme. And there's really good cases that support that idea. So here it's not just a frivolous, baseless maybe, not frivolous, piece of litigation, it is numerous separate other separate lies that are an effort to maintain that litigation. That's different from just criminalizing bringing a lightweight lawsuit. I mean, let's talk about the hacking allegations. Let's pretend there was nothing in this indictment other than the hacking allegations, which is a complete fabricated lawsuit, arguably.

MR. MOHRING: As alleged.

THE COURT: If true.

MR. MOHRING: As alleged.

THE COURT: Right. Which we've said enough times we know that means Mr. Hansmeier is presumed not guilty of these charges, the government has an enormous burden to prove them, no one doubts that, but for today our lens is to

assume they're true, the hacking allegations alone are utterly fabricated, completely fictional cases for litigation, that's the allegation, to get the Court to use its unique and narrowly tailored early discovery, that is not the subject of a fraud prosecution?

MR. MOHRING: It ought not be, no, it's not. In *Pendergraft* they were talking about false and fabricated evidence. And so let's talk about -- let's talk about the other cases that the government focussed on. You mentioned *Lee*. They also lean heavily on the *Eisen* case out of the Second Circuit, 1992. The cases that they cite to suggest that that the litigation at the heart is not frivolous and also just that what they have alleged is a permissible claim of a federal fraud -- a criminal fraud prosecution do not hold -- don't hold that, in our view. We're talking about cases that are beyond the Eighth Circuit and we're talking about cases that are treating -- and would appear to treat, and certainly I would concede this, would appear to treat allegations of serious misconduct that lies outside of the litigation itself beyond the filings in the litigation itself differently. *Eisen* talked about extensive, extra litigational activity, if you will, bribing, intimidating witnesses, conduct that extends far beyond simply a false allegation or a factual representation to the Court. The Court talks about the defendants in that case concocting

testimony wholly fabricated.

THE COURT: Well, arguably we have that allegation in this case. Concocting testimony wholly fabricated is not an entirely unreasonable analogy to the perjury allegations that are not just the perjury count but part of the alleged fraud, right?

MR. MOHRING: But you were asking about the hacking.

THE COURT: Oh, if we were viewing --

MR. MOHRING: The hacking allegations.

THE COURT: Right. Right. And I guess you have proven my point that we can't look at each of them in isolation, but I feel like the hacking is that -- is sort of pushing back on your idea that this is merely arguably frivolous litigation, that is, allegedly, fictional litigation.

MR. MOHRING: But that is, again, all things that are happening within the context of the litigation itself. The *Lee* case also focussed on extra litigational mailings to the bank, and the conviction relied not even on the lawsuit but on those separate mailings.

THE COURT: What were the mailings to the bank about?

MR. MOHRING: You know, I'm going from memory and I apologize, but *Lee* was sort of a weird kind of quasi tax

protestery set of views, I hope I'm getting the case right, in which people would, in line with a set of theories that were educated and sold and materials that were given to them, would close their checking accounts but continue to write checks and suggest to the bank that the bank could proceed in a different manner to collect on those checks, ultimately from the social security account and also ultimately going back to the United States, going off the gold standard in 1933, and so it was a variant of that set of views about history and financial reality and the government. And so the letters were written to the banks to I believe making that claim and encouraging the banks to actually make good on the checks that had been written after the accounts were closed, at least that's --

THE COURT: That --

MR. MOHRING: That's my memory of it.

THE COURT: How is *Lee* so different with the letters to the banks, though, from here with the settlement letters to the individuals, the pre-litigation settlement correspondence with the individuals?

MR. MOHRING: Well, the letters to the individuals were undertaken in the context of the civil lawsuit itself directly. The defect that the government I think would suggest, so what was wrong about the settlement letters, what was wrong I think centrally in the government's view

about the settlement letters was that the letters didn't indicate what, in the government's view, was that the people who were -- who were asking for settlement, trying to negotiate settlement, had been directly involved in installing the copyright materials that the people that they were asking to settle with had, in fact, downloaded. That's a very different set of constructs than making a completely unlawful set of suggestions to the bank. And those letters did not happen in connection with the litigation itself, where these ones did. I mean, it's common for a lawsuit to be filed and for discovery to happen and for --

THE COURT: But there was no lawsuit filed, at the time most of these letters were sent, there was no lawsuit filed, right?

MR. MOHRING: Well, but there was the application for the Court's authority and for discovery.

THE COURT: But that was started and finished by the time the settlement letters were sent, I mean, the discovery issue was over.

MR. MOHRING: Well, the people had been identified, but, again, all in the context of civil -- all in the -- the civil litigation context.

THE COURT: Okay.

MR. MOHRING: And, certainly, I mean, to the extent that there is tension between the *Eisen* case and the

Lee case and, again, it is meaningful to me that the universe of cases that we're talking about is as small as it is, but to the extent that there is tension between those cases and the law in the Eighth Circuit, obviously *Joseph*, *Joseph* controls.

THE COURT: Thank you, Mr. Mohring. I think I'm going to ask you to be seated, if you don't mind, and --

MR. MOHRING: Okay.

THE COURT: -- I've got a quite a few questions that you've already previewed for us for the government.

MR. LANGNER: Good morning, Your Honor.

THE COURT: Good morning. How are you?

MR. LANGNER: I can tell Your Honor is obviously very familiar with all of the arguments here so I'm going to try to focus in on things that were discussed with Mr. Mohring, and I'm sure you'll be able to ask me whatever questions you may have.

THE COURT: What makes you think that?

MR. LANGNER: I'm just learning as I'm going here, Your Honor. So turning first to the notion that there is somehow a public policy prescription on civil litigation forming the basis of a criminal fraud prosecution, particularly in this case, I don't think the case law supports that. As Your Honor pointed out, the *I.S. Joseph* case was fairly limited. I mean, really what they found was

that a threat to sue standing alone does not amount to a Hobbs Act extortion.

THE COURT: It's got some sweeping language for being fairly -- I mean, you're right, it talks a lot about extortion and where it's not talking about extortion it talks about whether two acts can constitute a, you know, I keep forgetting my magic RICO words, but a pattern of action but it makes some broad proclamations of the idea that we shouldn't use criminal prosecutions to prosecute litigation shenanigans.

MR. LANGNER: I understand. And in the context of that case you have two shipping companies that are in the middle of settlement negotiations and one of them says they're going to sue the other one, I mean, that is litigation shenanigans I suppose as you put it. But I think that's a far cry from what we have here. We have --

THE COURT: Well, there's fraudulent allegations underlying an attempt to get a settlement. There's -- I think there's some actual falsities, like, flat falsities in order to get a settlement. I mean, it's a different theory, it not criminal, it's civil, and it's a different theory of prosecution, but it certainly sort of stands for the idea that we should be cautious in converting even egregious litigation activities into a crime.

MR. LANGNER: And I think to the extent that, you

know, we need to be cautious about, you know, chilling access to the courts, I just think this is a case is not an example of where there's likely to a problem. I mean, when you have two parties, we want them to resolve their disputes in civil court and so if they get into a fight in the context of, you know, trying to figure out what they should do, you know, we don't want that to become a criminal issue. When you have somebody that's engaging in the extensive fraudulent deceptive construct that Mr. Hansmeier was and taking advantage of, you know, people that are getting these letters and out of sort of fear making these payments, I don't think we're running into that public policy. And, you know, the public policy is I think obviously dicta in that case and it's not articulated in terms of what should or shouldn't happen in any one case. And I don't think, you know, we should interpret that to mean that you cannot bring criminal prosecutions out of civil litigation when there is a clear fraudulent construct that exists outside of litigation as there is here.

THE COURT: Can I ask some questions about the non-litigation related fraudulent construct, because it feels to me like this entire construct was for the purpose of litigation or, you know, collateral to litigation related activities, unlike the *Lee* case where there's, you know, fraud related to trying to pay off a mortgage with

nonexistent money.

MR. LANGNER: Right.

THE COURT: Here it is all about either the using the courts, the threatening to use the courts to collect money from people.

MR. LANGNER: I mean, this is more like the *Eisen* case, frankly. The *Eisen* case is a situation where you have a law firm and investigators that are creating a fraudulent construct in order to get settlements out of insurance companies. I mean, that's essentially what you have here. Their goal -- I mean, the thrust of our indictment here is that their goal was to get money from these victims or these people that had downloaded their movies or potentially downloaded their movies. The court system or using litigation was not -- they only came to court because they had to get the identities of these people. Our allegations are that that, I mean, was a necessary step but really the focus was generating settlement fees from people outside of the litigation context.

THE COURT: With the threat of litigation.

MR. LANGNER: With a threat of litigation, yes. And, again --

THE COURT: Can I ask, and I apologize for my naïvety or maybe misunderstanding of your position, let's imagine the exact same scenario where there wasn't the

allegation of uploading so something closer to the *Malibu Media* line of cases maybe where there is a actual third party as opposed to the allegations here that owns these copyrights, there is sitting around on BitTorrent or whatever the cyber version of that is waiting for somebody to upload those movies and going to the court and saying we own the copyright to this movie with a horrible title, give us the identity of the person -- or the most likely identity of the person who uploaded, the identity of the person who owned the ISP and going to that person and saying if you don't pay me $5,000, I will sue you under your name and it will be very embarrassing for you. That is not fraudulent, right?

MR. LANGNER: Standing alone, while it might be distasteful, I don't believe it would be fraudulent, at least, you know, that has not been ruled fraudulent anywhere that I'm aware of. I would agree that if that was the only conduct that we had at issue, there was a client or a third party that actually owned those things and when coming to court to get permission to get early discovery they were honest with the court about what had happened and what they were doing, yeah, I would agree that that's not fraudulent. But that's not what happened here, obviously.

THE COURT: And here the distinctions are, one, that it wasn't done by a third party but there was a

pretense that it was; two, that it had been uploaded.

MR. LANGNER: Correct.

THE COURT: And those are the only real distinctions just between that part of what -- I recognize there's other stuff, that part of this fraud, those are the distinctions?

MR. LANGNER: I mean, I think that there's more conduct than just that. I realize that they all fit within sort of those categories, but we have them, you know, creating these sort of sham companies to pose as clients. They domiciled these in Nevis in order to disguise their ownership over them.

THE COURT: But people do that all the time with legitimate businesses, right, people try to create multiple financial structures that protect individual humans from liability for that what their businesses do, aren't there entire financial services industries designed to do that?

MR. LANGNER: There are. And but what you're getting into is what the intent is behind it and that's obviously a fact we would allege and we have alleged that the intent behind that was to disguise from courts who really controlled these clients, because they knew, and I think the evidence, as well as our allegations, will show that they knew that if they went to the court and told the courts what they were doing, the totality of it, that they

actually controlled their clients, that they were essentially running a settlement mill and that they had uploaded these movies online, that the courts would never have given them early discovery, and I think that that's played out in what actually happened in this case, let alone our allegations in the indictment.

Now, you also have them, I mean, I'm just going through the things. I realize these all do fit within the categories that you articulated, but they also went and filmed their own pornography.

THE COURT: Not a crime.

MR. LANGNER: And obviously they're allowed to do that, but the whole point of doing that was not to, you know, sell this or make any money from it but simply to upload it in order to get settlements from people. They then went and obtained copyrights on that, again, not so that they could market this and sell it and make money from it or do anything else other than to try and generate copyright violations.

THE COURT: Let's say that had been done by a business who said I'm going to make a really cheap horrible sounding pornographic movie, I'm going to hire you to prosecute -- I'm going to hire you to prosecute all of the people who get their hands on it, that is not a crime, right?

MR. LANGNER: Well, I mean, what ultimately --

THE COURT: Making a movie for copyright entrapment purposes or whatever term you want to use, that's not a crime.

MR. LANGNER: I mean, what ultimately makes this a crime is deceiving the courts, right, so if you're honest with the court about doing all of these things, you know, then I -- I would be hard pressed to say there's a crime here. If you tell people what you're doing, even if these things are all, you know, deceptive and lies, then it takes away any intent to deceive or scheme to defraud. But, yeah, I mean, each of these things, I think if you're not telling the Court that it's going on, it could constitute a fraudulent offense, even so far as, you know, creating the copyrights yourself and owning your own client, I think those things would be significant to a court, they would want to know those things in issuing early discovery, and so that could be a fraudulent offense.

Now, you know, we'd be in a slightly different situation, so there would be some question of, you know, does the government want to charge this, how would a court view it, I think we have so much conduct here that there's less question than in the scenario that you articulated. But I still think if you're lying to the court in order to get early discovery and you use that in order to get

settlements from these people, that is the fraudulent construct at issue here.

THE COURT: Are you alleging that the early discovery part of the scheme was a lie or an omission?

MR. LANGNER: I think it depends. In looking at the motions that were filed, there is both. I believe that a false statement, I mean, if you say something that without more information makes it false, I believe that's still a false statement, and I think we have a lot of that where they say something in the motion or even in the complaint where standing alone that, you know, without the additional information to understand what they said, that would be false. Now, there clearly is a lot of omissions as well. So I do think there's both in this case, and we would be proceeding under both.

THE COURT: And you think, let's imagine those are just omissions, that's okay?

MR. LANGNER: Yes.

THE COURT: You- -- okay. So one of the concerns that Mr. Hansmeier's team raised in their motion was the chilling effect and the assumption that courts wouldn't want to chill civil litigation, even frivolous. I'm not sure that all courts all days would necessarily agree with that. But he raised a very specific concern which is the idea that chilling can go beyond this arena of litigation into all

kinds of arenas, and I'm trying to think of an analogy for what you're alleging because --

MR. LANGNER: I think perjury is a good, I mean, obviously we want people to come in and we want them testify. I mean, that's something that we want to encourage in the civil litigation system. And yet, if they come in and they don't tell the truth, we will prosecute them for perjury. You know, there are two things going on, one is that you want to encourage the use of the civil litigation system and the other is you don't want it to be misused in a way that's fraudulent or dishonest.

THE COURT: Was it *Pendergraft* where there were un -- undisputed fraudulent affidavits and that wasn't enough?

MR. LANGNER: I mean, *Pendergraft* turned on whether there was an intent to defraud ultimately. What they said was yes, they were false affidavits, however, you knew that the person you were sending it to didn't really believe them so therefore you couldn't have had the intent to defraud.

THE COURT: Which isn't the law anyway so it's a little confusing because the success of the fraud isn't the point. But there, it's sort of like your perjury analogy, those were flat lies in those affidavits and that wasn't enough to give rise to I think it was criminal charges, it

might have been civil RICO.

MR. LANGNER: I mean, that's not what *Pendergraft* actually held. I realize -- I think their reasoning is a bit circumspect and they go out of their way to try to reach a conclusion, but they didn't hold that false affidavits aren't enough. And I think the *Lee* decision that came afterwards made pretty clear that that holding is fairly limited and that there isn't some broad prescription against civil litigation activities forming any part of a criminal prosecution. Obviously there are some concerns, there are some policy issues that have to be addressed both in terms of what the government decides to do. But I think we're pretty far afield from that and I -- and there is no case law that draws any sort of bright line or even a vague line as to, you know, what you can or can't do, and without that I think we have to go back to the broad purpose of the fraud statutes which are to remediate instances where somebody uses dishonest activity to obtain money or property.

And I think, you know, Justice Holmes' quote I think shows that utility and the purpose of that utility when he says that, you know, that the law doesn't define fraud, it's as versible as huge ingenuity. People find new ways to use dishonesty to obtain money every day. And the fact that they use the litigation system as part of that I don't think should get in the way of a criminal prosecution

where it's warranted and particularly in the facts of this case. I just don't think that this is going to have any sort of chilling activity on civil litigants. There is so much fraudulent activity and dishonesty even outside of the litigation context. We don't concede that that is at all the law in any of these cases. But even if you were to look at it that way, there's so much outside of the litigation context that I just don't think that public policy, to whatever extent it exists, is implicated by this case.

THE COURT: Let me ask this. I'm having a hard time finding any case law that suggests the uploading fact, as I want to call it, is something other than a defense.

MR. LANGNER: I don't think it --

THE COURT: That it undermines the prima facie invalidity, and the analogy I keep thinking of let's imagine a 1983 case where somebody claims excessive force against a law enforcement officer, this obviously would have much greater public policy concerns about the chilling effect, right, but somebody claims excessive force in their arrest and talks about how they were, you know, treated roughly or thrown to the ground or in other ways mistreated during their arrest and omits the truth, let's imagine in this hypothetical that they were punching and kicking and yelling and stomping so that is a defense to the 1983 claim that is not set forth in the complaint that clearly sort of

undermines the validity of the claim maybe out of the gate.

MR. LANGNER: Right.

THE COURT: They don't have an obligation to flag that defense for the defendant, right. They don't have an obligation to put that in their complaint, they don't have an obligation for when they ask the Court to use its subpoena power to -- or to serve the complaint, maybe through the marshal's service, to reveal that.

MR. LANGNER: I think, though -- I mean, first of all, I think the underlying, you know, whether this is defense viable or not, we disagree obviously on what the law holds, but I think it's beside the point. I mean, and I think you got to this in saying that really this is about getting the early discovery. Once they get the early discovery, they go get the settlements, the case falls -- they have no interest in litigating this. In fact, litigating this beyond the one step is antithetical to what they're trying to accomplish. And I do think they have an obligation to disclose whatever facts exist even if they're material to their position. And they knew, if you look at their behavior, if you look at our allegations, they knew that this information would have been material to a judge in ruling on this.

THE COURT: Where does that obligation come from? Where is their obligation to reveal a fact that is damaging

to their chance of litigation success in their discovery application, where does that obligation come from?

MR. LANGNER: Well, the point of the early discovery request is to get early discovery and the duty of candor is to reveal information not only, you know, that's positive for your position but anything that might be material to your position, and facts that would be, you know, material to a judge's decision, even if they were adverse to you about whether they're going to grant you early discovery, are relevant. I think that's well laid out in the rules of professional conduct.

And I mean, this isn't a hypothetical. They knew that their own control and ownership and uploading of this stuff was going to be relevant to a magistrate judge or whoever it was that was deciding whether to issue early discovery. And it actually, it played out that way. I mean, I realize it's after the fact, but when judges found out even that one fact, just that they actually controlled their own clients, they shut this down and they said you're not going to misuse our court to run a settlement mill. We're not going to --

THE COURT: But we have all kinds of information in civil litigation that a party doesn't reveal to the judge or the other side because it's dangerous -- it -- it's contrary to their position even though they maintain their

duty of candor to the Court which is, if you ask me I will tell you the truth and I won't try to create a false impression, but does that extend to an affirmative duty to disclose a fact about which I'm not asked but I think that you'd probably like to know? I mean, I recognize the proof is in the pudding. The magistrate judges, the district court judges, they did want -- had they known this information, they would not, let's assume for a moment, would not have issued these. I think that's probably hard to dispute. That goes to materiality. I'm not sure it goes to the duty to disclose.

MR. LANGNER: I understand. And I think we are wading into sort of the facts of what will play out, but I do think that that duty includes information that you know that that judge would want to know that's material and, frankly, would work against the relief that you're requesting from, so yes, I do believe that duty extends that far. And I mean, we're not talking about things that are kind of at the fringes here. I mean, we're talking about some very central things that magistrate judges were so outraged by that they immediately shut this down, referred them for criminal prosecution, you know, imposed sanctions. These are not facts that one might wonder will the judge want to know this or should -- I mean, this is pretty central to what they're trying to do and they knew they

needed to hide this by virtue of their own conduct.

THE COURT: Let's imagine that instead of talking about the early discovery part we're talking about the complaint, so let's imagine that there was a complaint filed alleging that somebody downloaded the movie and omitting that I uploaded the movie in the first place, that is less clearly criminal, right? It's not flagging a defense for the other side, but there's no *Brady* in civil litigation.

MR. LANGNER: Right. I mean, we are running pretty far afield because without the early discovery, without the effort to misuse the Court's subpoena power to go get settlements, you know, you're almost running into a factual defense of I really am trying to litigate this claim and this stuff might come out in the litigation. I think --

THE COURT: And then we're closer to the --

MR. LANGNER: I mean, we're closer, right. I mean, I don't know that I would want to concede that because I think if you make false statements in the affidavit, clearly with some of the other conduct, you know, we could still have a fraudulent scheme, but you're taking away really one of the main thrusts of what we've alleged which is that what they were trying to do was misuse the early discovery in order to get the settlement fees, so you're weakening my argument by taking that out.

THE COURT: I'm just -- I'm trying to, this is

sort of a frontier case. It's -- it's unique, and I'm trying to figure out some of the edges around both sides' arguments. If -- if you're arguing that there is no civil litigation conduct that should be protected from criminal prosecution, if Mr. Hansmeier's team is arguing that no civil litigation conduct could ever give rise to criminal prosecution, I'm trying to figure where the line is and which side of the line this case could fall on.

MR. LANGNER: Right.

THE COURT: So that's why I keep pushing --

MR. LANGNER: No, I understand.

THE COURT: -- on hypotheticals that I recognize are worse than the case that you are alleging. So I think I had just one other question for you.

MR. LANGNER: Sure.

THE COURT: And I guess this is sort of irrelevant because we keep reminding ourselves that we're dealing with the landscape set forth in the indictment rather than you might or might not be able to prove at trial, but is the evidence going to show many complaints that were actually filed in this litigation?

MR. LANGNER: Well, I think they filed many complaints because it was the precursor to getting their early discovery, generally, at least that's the way they operated it, they would do those two things in conjunction.

THE COURT: A complaint with a John Doe.

MR. LANGNER: Right.

THE COURT: Seeks the early discovery.

MR. LANGNER: Right.

THE COURT: And then what would happen with the complaint?

MR. LANGNER: Not in every case but in almost every case is it was dismissed.

THE COURT: And what would happen when it wasn't dismissed?

MR. LANGNER: You know, it varied. I'm not sure that I could give the Court a complete articulation of that.

THE COURT: Okay.

MR. LANGNER: And I'm trying to remember some of the purposes why they went on, but there were some cases that, you know, they would -- if they weren't getting information from the service providers, they might need to go back, sometimes the Court would say you need to identify a specific person and they would seek default judgments if they just couldn't get ahold of somebody, but I think that was in the minority.

I mean, most -- most of these cases were John Does, and many of them were, initially at least, in the thousands of John Does or at least in the tens and hundreds of John Does so that they could generate as many settlements

with as little litigation as possible. And when the courts got to the point where they started saying, you know what, we're not going to let you just do a thousand John Does and we're going to start asking some questions is when they shifted into trying to do the hacking allegations because what they realized is by using the computer fraud and abuse act they could allege a conspiracy, get a bunch of people into one complaint and then they recruited ruse defendants who weren't going to ask questions.

I mean, and these are very important facts in establishing what their true intent was. I mean, why recruit ruse defendants who are going to pretend to be a defendant if your point is to actually litigate a claim? Of course that's going to come out. And in fact, they promised these people that they would dismiss the case as soon as they got discovery. So I don't want to over generalize an answer to your question, but I know that there were at least some cases that for whatever reason they pushed forward and named a defendant in order to try and wrap it up quickly.

THE COURT: Okay. I think that that is the set of questions I had for you. I've given you much less time than I gave to the defense.

MR. LANGNER: That's okay.

THE COURT: Anything else you want to share with me or have me keep in mind?

MR. LANGNER: I don't think so. I mean, I can tell Your Honor is already aware of our brief. The one other thing I'd emphasize is that, you know, the violations of the ethical rules, obviously we're not arguing that those in and of themselves somehow constitute fraud, but our allegations in relation to the violation of the ethical rules serve a purpose, to show materiality, to show a duty to disclose or as evidence of intent to defraud, so, you know, we're not arguing that those standing alone somehow constitute fraud, but I think I've covered all of the other points I wanted to make. Thank you.

THE COURT: Okay. Thank you very much. Mr. Mohring, I'll give you a couple of minutes.

MR. MOHRING: Thank you, Your Honor. Well, I'd like to just speak a little bit to policy and the role that I think the policy considerations that we've raised ought to play in the Court's consideration of this motion to dismiss. We've identified a number of specific defects, what we see as -- in -- and as supported as specific defects in the indictment, each one of which is sufficient in light of the authority that we've cited, to support a motion to dismiss.

The prosecution in partial response and the Court, one of the Court's questions of the prosecution here this morning suggested that, you know, the whole is greater than the sum of the parts, and I want to push back on that a

little bit. If the parts are invalid, the whole cannot be valid. And I'm not aware of any case, and the government has certainly not cited any, for the proposition that a viable criminal accusation can be based on a collection of invalid pieces. And so on its face the indictment is deficient in a number of ways that we've demonstrated, and you don't have to look to policy to reach that conclusion.

But I think that the biggest context in which this lawsuit is being brought is relevant in at least two ways. We are talking about copyright litigation in what is a new era. The prevalence of digital media and the ease of copying and disseminating digital media presents a real challenge to making real the copyright protection that is written on the books, bringing that into reality. But there is also the fact that an -- and I don't think that it can be disputed that what the government is endeavoring to do is to selectively criminalize a component of civil litigation. And I hear the prosecution saying that you don't have to worry about chilling here, and I'm glad that they have that view. It would be deeply offensive if they did not. But just because they say that you don't have to worry about it doesn't mean that that is not a legitimate set of concerns for the Court to have.

We speak at length, and I won't go into that level of detail here, about how central to the functioning of this

society our principles of free and open access to the civil court system as a way of peaceably resolving disputes, and that set of concerns go deep. They're implicit in the Federal Rules of Civil Procedure and the evolution from notice pleading -- from forum pleading to notice pleading that has gone on and --

THE COURT: But that has limits, Mr. Mohring. I mean, there's no doubt that even our, as you describe, reverence for civil litigation and the rule of law doesn't preclude prosecution for perjury as Mr. Langner, you know, suggests or prosecution for obstruction of justice or prosecution for conduct in the civil litigation arena that is clearly criminal and sending people to prison for it.

MR. MOHRING: Right.

THE COURT: So it's not immune. The more difficult question is, is it fraud?

MR. MOHRING: Right. And in answering to that question, to which I hear what you're saying as far as, you know, where should the line be, but in answering that question, the fact that what we are talking about is an effort to criminalize civil litigation is relevant. The fact that that is happening in the arena of copyright where the challenges, the societal challenge of bringing, actually having the protections that the statutes afford, having actually have a meaning in reality is -- has been deeply

challenged by the changes and developments in technology. And I would suggest that -- I mean, part of what I hear the prosecutor saying about you don't need to worry about that because this is unsavory litigation, I --

THE COURT: I think they're saying that this is fraudulent litigation --

MR. MOHRING: Right.

THE COURT: -- rather than unsavory.

MR. MOHRING: They are --

THE COURT: The porn troll normative aspersions assumes a third-party owner, non-uploading and it is still considered unsavory. If that's what was being prosecuted, we wouldn't have spent an hour and ten minutes on the motion to dismiss. I think it goes beyond unsavory when there is -- or they allege it goes beyond unsavory when there are such extensive fraudulent false and omitting relevant facts throughout all aspects of the scheme and the hacking scheme, the perjury plan, the third party allegedly sham entities, the concealing the true ownership nature, the concealing of things that would have, had they been revealed, not led to the issuance of early discovery. I recognize that it's dangerous to say, oh, as long as they all kind of gloss together and something sounds bad, that constitute fraud, but we were kidding ourselves to view each one in isolation and ignore the others, and the case law really admonishes

that that is true.

MR. MOHRING: But if the individual -- again, if the individual pieces are defective, the whole is also defective, and I think that we have --

THE COURT: But they would all have to be pretty defective.

MR. MOHRING: And so, I mean, the Court has said we're beyond unsavory. Obviously the real question is not whether we're beyond unsavory or whether we're not, we can agree to disagree about that, but whether we are, in fact, past and into criminal. And on that, the fact that we are treading into and using civil litigation and trying to criminalize that is relevant and so in making a decision of whether that's a step that really should be supported here, the last piece that I would make, the thing that I want to say to the Court, is that that is a step that should be taken very carefully and only in a -- under circumstances of great need, and I do not see that need here, specifically because, as is abundantly demonstrated in the pleadings before the Court, the existing processes, the normal processes, at which the type of concerns the government is raising here in this criminal prosecution get ventilated and discussed and adjudicated, are all functional.

The term says criminal prosecution in this case is both radical and unnecessary because of the civil processes

that we used extensively and effectively along the way, from dismissal of actions to case specific sanctions, aggravated and enhanced attorney fee orders, and the quite extensive activity of attorney disciplinary processes, and, you know, maybe the need from a policy perspective to step into the criminal realm would be more clear if none of that stuff had happened or if those processes were shown to be ineffective or deficient but they're not.

THE COURT: Isn't it pretty clear in the law that the decision if, if there is a legally viable criminal prosecution and less onerous civil regulatory or other civil penalties, it is not up to me or Judge Ericksen but up to the prosecutor which of those to deploy?

MR. MOHRING: The decision whether to a charge is a matter of prosecutorial discretion, but the evaluation --

THE COURT: But the decision whether to use a lesser sanction, a non-criminal sanction, if both are legitimate, which I recognize you're not conceding, that, I can agree, hypothetically, that those lesser civil remedies were legitimate, but my feeling that because they could have done less they shouldn't have done this is not the same thing as they can't do this, and I find no support in the case law for the idea that my belief that other lesser choices would adequately deter this precludes them from being able to use the greater criminal sanction if it is a

legally viable theory.

MR. MOHRING: I don't disagree with any of that. My only point is that in being invited to take what we view as a very dangerous step into new territory, the adequacy of existing structures is an appropriate consideration.

THE COURT: Okay. Thank you. Thank you very much.

A couple of observations. I have seriously considered the motion for the Bill of Particulars. I'm going to deny the motion for the Bill of Particulars. If there were concerns about lack of clarity and the government's theory, I -- I find those somewhat unpersuasive in the face of a really extensive indictment. And I know that the case law surrounding the Bill of Particulars doesn't extend to answering all of the questions that the defense might have. But to the extent that that would have been a stronger motion prior to the government's response to the motion to dismiss, I think any things that could ever rise to deficiency and with detail have been corrected.

The case law makes really clear that the Bill of Particulars cannot correct omissions in a motion to dismiss and so that they can't fix -- or an indictment so they can't fix flaws with a Bill of Particulars, nor can the Bill of Particulars undermine valid arguments or valid theories set forth in an indictment. So I think as a facial matter I

would have denied it anyway absent the extensive briefing and conversations that we've had, but in light of the extensive briefing and conversations that we've had, the standard in our circuit for when a Bill of Particulars is necessary has been more than satisfied.

Mr. Mohring and Ms. Atwal, I recognize that you've identified a list of questions that the indictment doesn't answer, and I think they're correct questions that the indictment doesn't answer, but the Bill of Particulars isn't about getting an answer to all of the questions we might have, although I encourage you to ask opposing counsel to ask those questions. At this point, I will be denying the motion for the Bill of Particulars.

Mr. Mohring, would you like to make any record with respect to that?

MR. MOHRING: Your Honor, I would push back just on this point. The indictment characterizes an extremely sweeping in imprecise ways a number of potential victims in this case and the answer to the fundamental -- but the answer to the fundamental question is, okay, if there was a fraud, who was the victim, how were they victimized, and what are the damages, what was the loss, that is something that -- that is not reflected in the indictment. The indictment talks about fraud on the court type of stuff. Are you a victim in this case? Is Judge Ericksen? Are the

judges of this court? The answers to those questions have profound jurisdictional implications to the extent that the motion to dismiss is denied.

And so I push back within the context of the Bill of Particulars because the indictment is so vague on the concept of who the actual victims are. I would push back on that in the context of the Bill of Particulars, in the context of a *Agers* specific *Brady* request for exactly that information.

And I would also say that we're also well within the scope and I believe that we articulated or tried to at least articulate this point in the discovery response to the government's response to our motion, separate from the motion to dismiss response, that I think we're well within the parameters of Rule 16, that information or documentation about who the victims are, documentation of their victimization and the specific -- and any loss that those documents are directly relevant to preparation of the defense in this case. And so --

THE COURT: Which isn't --

MR. MOHRING: -- Rule 16 --

THE COURT: -- about the Bill of Particulars but the discovery.

MR. MOHRING: Beg your pardon?

THE COURT: That is not about the Bill of

Particulars but discovery?

MR. MOHRING: The Rule 16 entitles us to this information that we're asking for. The Bill of Particulars articulates the same request and the *Brady* motion articulates the same request.

THE COURT: Okay.

MR. MOHRING: And so I'm pushing back especially just on information about victims about which the indictment itself is vague and unspecific.

THE COURT: Okay. Thank you. Mr. Langner, I do have a question for you about that. Have you provided information about who the government considers to be victims in this matter?

MR. LANGNER: I believe so. And we've had discussions about that topic. I understand they may not like our answers, but the victims in this case were the people that provided settlement fees to Mr. Hansmeier and Mr. Steele. Any information we have about who those people are, I mean, their names or --

THE COURT: And have you provided names, to the extent that you have them?

MR. LANGNER: Yes. Now, if it's in the Jencks materials, we'll be turning that over separately, but any information that we have anywhere else has been turned over or made available. Now, obviously a lot of these are John

Doe lawsuits and so tying up the amount that was paid to maybe a check or a series of checks that are in the bank accounts, I mean, we've done some of that work. The defense, you know, either might have to do that work or we'll have to talk about, you know, who these people are, but all of the information we have is available to them, and so who these people are, it should be, you know, apparent, to the extent that we can figure it out, anyway.

THE COURT: Okay. Thank you. Anything else on any of the motions on behalf of Mr. Hansmeier?

MR. MOHRING: No, not for this morning. Thank you, Your Honor.

THE COURT: Okay. Anything else from the government?

MR. LANGNER: No, Your Honor.

THE COURT: Okay. Before we recess, I would like to note that I believe we have the honor of having Andrew Mohring before us for his final court appearance after 28 years of service as an assistant federal defender. And on behalf of the Court, on behalf of his colleagues, his former colleagues, his opponents, but most importantly, on behalf of his clients who have benefitted from his service, thank you for 28 years, and I'm glad I got to preside over that last appearance. It's a little sentimental. And we will get a ruling on this very important motion to dismiss

out as soon as possible. Thank you. We are in recess.

MR. MOHRING: Thank you, Your Honor.

(Proceedings concluded at 10:23 a.m.)

* * *

I, Staci A. Heichert, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: *s/ Staci A. Heichert*

Staci A. Heichert,
RDR, CRR, CRC